Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 78-63

RICKY MANN MOON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No.

RICKY MANN MOON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioner Ricky Mann Moon respectfully requests that a Writ of Certiorari issue to review the judgment of the Supreme Court of Virginia entered on April 11, 1978, which upheld petitioner's conviction for possession of marijuana with intent to distribute it.

OPINIONS BELOW

No opinions were issued by the courts below.

JURISDICTION

The decision of the Supreme Court of Virginia denying a Writ of Error and Supersedeas, thereby affirming appellants' judgment of conviction in the Westmoreland

County Circuit Court was entered on April 11, 1978. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether Virginia law, which provides penalties for possession of marijuana with intent to distribute it of five to forty years imprisonment, the same as those imposed for distribution of hard drugs like heroin, barbiturates and amphetamines, violates the due process and equal protection clauses of the Fourteenth Amendment.

2. Whether a warrantless search of the car Moon was driving and the additional warrantless search of a bag in the car found later to contain marijuana was permissible under the Fourth Amendment, where the search was not incident to an arrest and where the government introduced no evidence to suggest that exigent circumstances required a warrantless search.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment to the United States Constitution:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The text of the Virginia Statutes listed below and set forth in the Appendix:

§18.2-248

§54-524.84:4

STATEMENT OF THE CASE

On August 7, 1976, Ricky Mann Moon, then age 19, and two companions drove into a hotel parking lot in Colonial Beach, Virginia, and parked the car they were driving, which was on loan from Moon's employer. Tr. 90, 143, 180.[1] Shortly thereafter, Officer R. D. Davis of the Westmoreland County Police pulled his squad car up behind them. The three occupants alighted from the car. Davis approached them and, though he possessed no search warrant, searched all three individuals for contraband drugs. Tr. 90. He found no drugs or weapons in their possession, and saw no drugs in plain view in the car. Tr. 145-46.

Davis released the two individuals accompanying Moon. Tr. 36. He then proceeded to search the borrowed car and found a brown grocery bag under the front

[1] References are to the trial transcript.

seat. He opened the bag, searched its contents, and found what was subsequently identified as several ounces of marijuana. Tr. 120-121. Davis arrested Moon and Moon was eventually indicted for the crime of possession of marijuana with intent to distribute it. Since marijuana is classified in Virginia as a Schedule I narcotic, Moon's offense was a felony carrying a minimum sentence of five years imprisonment and a maximum of forty years imprisonment, the same sentence as he would receive if the drug involved were heroin, amphetamines or another hard drug. Va. Code §18.2-248, 54-524.84:4. He was tried without a jury on April 12, 1977, in Westmoreland County Circuit Court, convicted and, on June 1, 1977, sentenced to ten years imprisonment, eight of which the court suspended.

Prior to his trial, Moon moved to dismiss the case on the ground that the imposition of identical penalties for possession with intent to distribute marijuana as are imposed for offenses involving far more dangerous drugs such as amphetamines and heroin, is arbitrary and irrational and hence a violation of his right to due process and to equal protection of the law. Tr. 7-76. He presented evidence that marijuana has none of the addictive or other harmful effects of hard drugs like heroin and morphine, and argued on the basis of these facts that it was utterly arbitrary for Virginia constitutionally to classify marijuana with these drugs for punishment purposes. The court denied his motion.

Moon also moved to suppress evidence used against him deriving from the warrantless search of the automobile he was driving because it violated his right under the Fourth Amendment to be free from unreasonable searches and seizures. Tr. 93-120. The Commonwealth introduced no evidence to suggest that exigent circumstances existed to justify the warrantless search and did not explain why the car containing the brown paper bag

was not impounded so that a warrant could be obtained. It also admitted that neither the search incident to arrest nor plain view doctrines applied to the search. The trial court nevertheless upheld the validity of the search, stating, "It looks to me like the law has gotten more liberal so far as searches are concerned, at least that's the way I interpret the recent Supreme Court decisions." Tr. 119-120.

On June 3, 1977, Moon timely noted an appeal of his conviction to the Supreme Court of Virginia pursuant to Rule 5:6 of the Rules of the Supreme Court of Virginia. He assigned as error, *inter alia,* the issues raised in this petition. On April 11, 1978, the Virginia Supreme Court affirmed Moon's conviction without opinion. A copy of the court's order is contained in the Appendix.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS THE IMPORTANT, CURRENT, AND MUCH LITIGATED QUESTION OF WHETHER THE PUNISHMENT FOR OFFENSES INVOLVING MARIJUANA, A NON-ADDICTIVE DRUG, WITH ADDICTIVE DRUGS SUCH AS HEROIN IS ARBITRARY AND IRRATIONAL AND HENCE VIOLATIVE OF THE FOURTEENTH AMENDMENT.

A. The Classification of Marijuana With Hard Drugs For Punishment Purposes Is Utterly Irrational

Many years of research have shown that formerly held assumptions about the dangerousness of marijuana to be unfounded and the severe penalties for its illegal use and distribution have been altered in many jurisdictions. In particular, recognizing the vast differences between marijuana and drugs like heroin and amphetamines, states and the federal government have imposed lesser penalties for

possession of marijuana with intent to distribute it[2] than they do for equivalent offenses involving hard drugs. Other states, including Virginia, have resisted this change, and still classify marijuana for punishment purposes as a Schedule I drug, with drugs having such devastating harmful effects as morphine, heroin, and amphetamines, so that its possession with intent to distribute it (even, as here, such a small amount as eleven ounces) carries severe punishment, here a minimum of five to a maximum of forty years imprisonment. *See* Virginia Code §18.2-248 (punishment); §54-524.84:4 (schedule).[3] The number of marijuana prosecutions under this and other harsh but irrational statutes, involving so many instances of lengthy incarceration, warrants review of these punishment schemes.

While recognizing the power of the state to classify drugs and punish their illicit sales, the Constitution imposes limits on Virginia's power in requiring some rational basis for the classification, *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920), which does not exist in this case. As the Supreme Court has explained:

> [W]e recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938).

[2] *See, e.g.*, 21 U.S.C. §841 (b); Ariz. Rev. Stat. §§36-1002 through 36-1002.07; Ill. Rev. Stat. Ch. 56½ §§704, 1401, 1402; Mass. Gen. Laws Ann. Ch. 94C §§31, 32, 34; Mo. Rev. Stat. §195.200; Tenn. Code Ann. §§54-1413, 1422, 1432; Tex. Penal Code Ann. tit 71, §§4.03-4.05.

[3] Other such statutes include Ala. Code Title 22 §258(47); Nev. Rev. Stat. §§453.321, 453.337, 453.336. W. Va. Code §1385(23).

A legislative declaration of fact, moreover, appearing reasonable when enacted, does not insulate the statute from judicial review. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924).

This Court has in the past had occasion to review drug classification schemes in the related context of statutory presumptions contained in 21 U.S.C. §176 that persons who possessed marijuana would be presumed to know the marijuana had been illegally imported. The Court held the presumptions invalid, for it was "based upon a legislative declaration of facts subject to attack on the ground that the facts no longer exist." *Leary v. United States*, 395 U.S. 6, 38 n. 68 (1969). In *Turner v. United States*, 396 U.S. 398 (1970), the Court performed similar analysis as to presumptions concerning cocaine and heroin.

The evidence presented in this case, when coupled with studies by scholars and researchers throughout the country, demonstrates overwhelmingly that no rational basis exists for the classification of marijuana as a Schedule I drug for all purposes, along with heroin and amphetamines. Dr. Dorothy Whipple testified in this case that marijuana is not addictive; that it does not produce tolerances; that it is much less dangerous than amphetamines or heroin; that there is not a single recorded incident of a death from an overdose of marijuana in a laboratory animal or in a human being, that it has

medical uses;[4] and that it has more benign physiological effects than alcohol or tobacco.

These conclusions have been confirmed by the most respected academic and governmental studies of the effects of marijuana. The National Commission on Marijuana and Drug Abuse, in its study, *Marijuana: A Signal of Misunderstanding* (1972) reported no significant physiological effects of marijuana, either long or short term, and found no evidence of addiction or high potential for abuse. The Commission further found that marijuana use is not associated with crime and that it did not lead to use of hard drugs. The same conclusions were reached by Dr. Lester Grinspoon, Professor of Medicine at Harvard University and the nation's most noted authority on the subject, in *Marijuana Reconsidered* (1971), by the more recent study by the Domestic Council Drug Abuse Task Force, *White Paper on Drug Abuse* (1975), and by the annual reports to Congress by the Department of Health, Education and Welfare, *Marijuana and Health* (1971-1976).

It is thus completely irrational to expose a person convicted of possession with intent to distribute marijuana to the same penalties as one who engages in similar activity with respect to heroin, morphine and other drugs.

The effects of that arbitrariness on individuals throughout the United States can hardly be underestimated. Hundreds, perhaps thousands of people, including young people like Moon, continue to be victims of a punishment

[4] Indeed, in litigation, the United States has recently agreed to permit medical use of marijuana for glaucoma by a private citizen for non-research purposes. *Randall v. United States*, No. 78-0817 (D.D.C., May 18, 1978).

scheme which has no relation to the seriousness of the crime committed or to offenses involving hard drugs. Because states like Virginia refuse to change their legislation is no excuse for the perpetuation of punishments so unfitting to the crime and repugnant to constitutional standards. Hence certiorari should be granted.

B. There Exists A Conflict Of Authority Concerning The Constitutionality of Punishing Marijuana Offenses As Harshly As Those Involving Hard Drugs.

At least two state courts have held that the punishment of marijuana offenses similarly with those involving hard drugs is completely irrational and hence a violation of federal constitutional guarantees of equal protection of the law. In *People v. Sinclair*, 387 Mich. 91, 194 N.W.2d 878 (1972), the Michigan Supreme Court considered the sentence of nine and one half to ten years imposed on a person convicted of possession of marijuana. Although the majority found the sentence in violation of the cruel and unusual punishment clause of the constitution, the concurring opinions suggested that the categorization of marijuana with hard drugs was a denial of equal protection under the laws. In *People v. McCabe*, 49 Ill. 338, 275 N.E.2d 407 (1971), the defendant successfully challenged the existing Illinois statute, which provided a mandatory ten year minimum sentence for marijuana first offenders. The court held that marijuana was misclassified among addictive drugs. Other states, while upholding the *classification* of marijuana along with hard drugs, have expressly held that the classification was permissible only because lower *punishments* were imposed for marijuana offenses than for offenses involving hard drugs. *See, e.g., Hawaii v. Kantner*, 53 Haw. 371, 493 P.2d 306 (1972).

Other states, however, have upheld penalty schemes similar to Virginia's, refusing to distinguish marijuana from hard drugs for punishment purposes. *See, e.g., Tracey v. Janco,* 351 F.Supp. 836 (N.D. W. Va. 1972); *Sherman v. State,* 89 Nev. 77, 506 P.2d 417 (1973); *Boswell v. State,* 290 Ala. 349, 276 So.2d 592 (1973). This conflict in authority provides additional reason to grant the Writ.

II.

THIS CASE PRESENTS THE IMPORTANT QUESTION OF THE PROPER APPLICATION OF *UNITED STATES v. CHADWICK* TO SEARCHES OF PACKAGES FOUND IN AUTOMOBILES.

The decision below in this case demonstrates a continuing refusal of state trial and appellate courts to abide by this Court's decisions concerning the permissible scope of warrantless searches of automobiles and their contents, even after *United States v. Chadwick,* 433 U.S. 1 (1977).

The automobile exception applies only in three types of situations. First, an automobile may be searched if there is actual danger that a vehicle containing contraband will be driven away. *Coolidge v. New Hampshire,* 403 U.S. 443 (1971). Second, the exception applies where the vehicle is lawfully in police custody and, in order to protect the public or perform normal police functions, the vehicle must be inventoried. *South Dakota v. Opperman,* 428 U.S. 364 (1976); *Cady v. Dombrowski,* 413 U.S. 433 (1973); *Cooper v. California,* 386 U.S. 58 (1967). Finally, an automobile may be searched incident or subsequent to an arrest under circumstances which would permit any other search incident to an arrest. *Texas v. White,* 423 U.S. 67 (1975); *Chambers v. Maroney,* 399 U.S. 42 (1970).

Virginia has never claimed that petitioner's automobile was the subject of an inventory search and, as already stated, this is not a case of a search incident to arrest. The only remaining possible exception is that exigent circumstances existed which compelled the arresting officer to act quickly in order to prevent escape. But there is no evidence in this case that petitioner was about to flee or that the arresting officer believed he was about to flee.

Yet the trial and appellate courts have refused to abide by these decisions, thereby warranting review here. Furthermore, the Virginia Supreme Court ignored the constraints on searches of automobile contents imposed by *United States v. Chadwick,* 433 U.S. 1 (1977). In *Chadwick,* this Court invalidated the warrantless search of a locked two hundred pound trunk of marijuana found in an automobile, even though a search of the car itself might have been proper. Rather, the Court held that the proper procedure was to have seized the trunk and obtained a warrant for its search. The rationale for this ruling was that there is a significant expectation of privacy surrounding closed containers which mandates the protection of a judicial warrant before a search. The countervailing governmental interests of preventing the removal or destruction of the evidence in a container, and in protecting against the use of any concealed weapons, were held to be satisfied by seizure of the container.

Thus, under *Chadwick,* a warrantless search of a closed container found in a stationary automobile, once the container is safely seized, cannot be legitimated either by the automobile exception to the warrant rule, based on the danger of flight, or by the search incident to arrest exception to the warrant rule, based on the possibility of the use of force to prevent arrest. *See United States v. Moore,* 562 F.2d 106 (1st Cir. 1977).

Here, the closed bag which was under the arresting officer's control and which was not within the area of petitioner's control, should have been seized and a warrant obtained for its search.

In addition to righting the injustice done to petitioner, granting the writ in this case would provide clarification for state courts on the proper application of *Chadwick* to automobile searches, which occur with such regularity. This clarification is especially important since under *Stone v. Powell,* 428 U.S. 465 (1976), federal habeas corpus procedure is not available to a state prisoner to challenge the constitutionality of a search, evidence from which was used at his trial, if he has fully litigated his claim in state court. Furthermore, review by certiorari here is his only opportunity for federal review of Moon's Fourth Amendment claims, claims summarily dealt with by both the trial court and the Virginia Supreme Court. *See Mincey v. Arizona,* 46 U.S.L.W. 4737 (June 21, 1978) (Marshall, J., concurring). The unavailability of any other federal review provides an additional reason to grant the Writ.

CONCLUSION

For the foregoing reasons, petitioner urges that this Court issue a Petition for Certiorari to review the decision below.

Respectfully submitted,

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July, 1978

APPENDIX

APPENDIX

§ 18.2-248. Penalties for manufacture, sale, gift, distribution or possession of a controlled drug.—Except as authorized in The Drug Control Act, chapter 15.1 (§ 54-524.1 et seq.) of Title 54 of this Code, it shall be unlawful for any person to manufacture, sell, give, distribute or possess with intent to manufacture, sell, give or distribute a controlled substance.

(a) Any person who violates this section with respect to a controlled substance classified in Schedule I or II shall upon conviction be imprisoned for not less than five nor more than forty years and fined not more than twenty-five thousand dollars; . . .

§ 54-524.84:4. Schedule I.—(a) The controlled substances listed in this section are included in Schedule I.

(b) Any of the following opiates, including their isomers, esters, ethers, salts and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers and salts is possible within the specific chemical designation:

(1) Acetylmethadol;
(2) Allylprodine;
(3) Alphacetylmethadol;
(4) Alphameprodine;
(5) Alphamethadol;
(6) Benzethidine;
(7) Betacetylmethadol;
(8) Betameprodine;
(9) Betamethadol;
(10) Betaprodine;
(11) Clonitazene;
(12) Dextromoramide;
(13) [Repealed.]

(14) Diampromide;
(15) Diethylthiambutene;
(15a) Difenoxin;
(16) Dimenoxadol;
(17) Dimepheptanol;
(18) Dimethylthiambutene;
(19) Dioxaphetylbutyrate;
(20) Dipipanone;
(21) Ethylmethylthiambutene;
(22) Etonitazene;
(23) Etoxeridine;
(24) Furethidine;
(25) Hydroxypethidine;
(26) Ketobemidone;
(27) Levomoramide;
(28) Levophenacylmorphan;
(29) Morpheridine;
(30) Noracymethadol;
(31) Norlevorphanol;
(32) Normethadone;
(33) Norpipanone;
(34) Phenadoxone;
(35) Phenampromide;
(36) Phenomorphan;
(37) Phenoperidine;
(38) Piritramide;
(39) Proheptazine;
(40) Properidine;
(40a) Propiram;
(41) Racemoramide;
(42) Trimeperidine.

(c) Any of the following opium derivatives, their salts, isomers and salts of isomers, unless specifically

excepted, whenever the existence of these salts, isomers and salts of isomers is possible within the specific chemical designation:

(1) Acetorphine;
(2) Acetyldihydrocodeine;
(3) Benzylmorphine;
(4) Codeine methylbromide;
(5) Codeine-N-Oxide;
(6) Cyprenorphine;
(7) Desomorphine;
(8) Dihydromorphine;
(8a) Drotebanal;
(9) Etorphine;
(10) Heroin;
(11) Hydromorphinol;
(12) Methyldesorphine;
(13) Methyldihydromorphine;
(14) Morphine Methylbromide;
(15) Morphine Methylsulfonate;
(16) Morphine-N-Oxide;
(17) Myrophine;
(18) Nicocodeine;
(19) Nicomorphine;
(20) Normorphine;
(21) Phoclodine;
(22) Thebacon.

(d) *Hallucinogenic substances.*—Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of its salts, isomers, and salts of isomers, whenever the existence of such salts, isomers, and salts of isomers is possible within the

specific chemical designation (for purposes of this paragraph only, the term "isomer" includes the optical, position, and geometric isomers):

(1) 3,4-methylenedioxy amphetamine;
(2) 5-methoxy-3,4-methylenedioxy amphetamine;
(3) 3,4,5-trimethoxy amphetamine;
(4) Bufotenine;
(5) Diethyltryptamine;
(6) Dimethyltryptamine;
(7) 4-methly-2,5-dimethoxyamphetamine;
(8) Ibogaine;
(9) Lysergic acid diethylamide;
(10) Marijuana;
(11) Mescaline;
(12) Peyote;
(13) N-ethyl-3-piperidyl benzilate;
(14) N-methyl-3-piperidyl benzilate;
(15) Psilocybin;
(16) Psilocyn;
(17) Tetrahydrocannabinols;
(18) Hashish oil (Some trade or other names: hash oil; liquid marijuana; liquid hashish);
(19) 2,5-dimethoxyamphetamine (Some trade or other names: 2,5-dimethoxy-a-methylphenethylamine; 2,5-DMA);
(20) 4-bromo-2,5-dimethoxyamphetamine (Some trade or other names: 4-bromo-2,5-dimethoxyamethylphenethylamine; 4-bromo-2,5-DMA);
(21) 4-methoxyamphetamine (Some trade or other names: 4-methoxy-a-methylphenethylamine; paramethoxyamphetamine; PMA) (1972, c. 798; 1973, c. 479; 1976, c. 614; 1977, c. 302.)

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday *the* 11th *day of*

Ricky Mann Moon, Appellant,

against Record No. 771223
Circuit Court No. 7

Commonwealth of Virginia, Appellee.

From the Circuit Court of Westmoreland County

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

Allen L. Lucy, Clerk

By: /s/ Richard R. Bruish
Deputy Clerk